No. 91-590

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNION NATIONAL BANK OF LITTLE ROCK, PETITIONER

v.

ROBERT MOSBACHER, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECRETARY OF COMMERCE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 19 U.S.C. 2350 grants the regional district courts subject-matter jurisdiction over actions against the Secretary of Commerce to enforce guaranty agreements executed by the Secretary pursuant to the Trade Act of 1974, 19 U.S.C. 2341 *et seq.*

2. Whether the district court properly concluded that Fed. R. Civ. P. 38(d) barred petitioner from withdrawing its request for a jury without respondent's consent.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 933 F.2d 1440. The opinions of the district court (Pet. App. A33-A35, on the jurisdictional issue, and App., *infra*, 1a-12a, on the jury trial issue) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1991. A petition for rehearing was denied on July 8, 1991. Pet. App. A19. The petition for a writ of certiorari was filed on October 7, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1981, the Economic Development Administration in the Department of Commerce, acting pursuant to the Trade Act of 1974, 19 U.S.C. 2341 *et seq.*, guaranteed certain loans from petitioner to Leird Church Furniture Manufacturing Company. Pet. App. A5. Because the loans were not repaid in a timely manner, petitioner filed suit against the Secretary in July 1985 to enforce the guaranties in the Circuit Court of Pulaski County, Arkansas. *Id.* at A24-A26. In August 1985, the Secretary removed the case to the United States District Court for the Eastern District of Arkansas, relying initially on 28 U.S.C. 1441(b), but later on 28 U.S.C. 1441(a)[1] and 1442. Pet. App. at A27-A31.

2. In November 1985, the district court held that the Secretary properly had removed the case to federal court. Pet. App. A33-A35. It concluded that removal was appropriate under 28 U.S.C. 1442 (which allows removal of cases brought against federal officers, see *Mesa* v. *California*, 489 U.S. 121 (1989)), and thus found it unnecessary to consider whether Section 1441(a) also justified removal.

3. Although petitioner initially had requested a jury trial, it subsequently moved to withdraw its motion for a jury trial.[2] App., *infra*, 5a-6a. The district court rejected petitioner's motion. First, it concluded

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[1] In relevant part, 28 U.S.C. 1441(a) provides for removal from state court to federal court of any action "of which the district courts of the United States have original jurisdiction."

[2] The motion was made to the federal bankruptcy court, which was responsible for the case after it was consolidated with Leird's bankruptcy case, which was also pending in the Eastern District of Arkansas. See, App., *infra*, 5a-6a.

that government officers such as the Secretary are entitled to a jury trial under common-law principles because the case alleged a breach of contract, an action that would have received a jury trial at common law. Second, and alternatively, it concluded that—even if the Secretary was not entitled to a jury trial—petitioner could not withdraw its demand for a jury trial without the consent of the Secretary. See Fed. R. Civ. P. 38(d) ("A demand for trial by jury * * * may not be withdrawn without the consent of the parites."). App., *infra*, 10a-11a.

4. With respect to the Secretary, the court of appeals affirmed. Pet. App. A1-A18. With respect to petitioner's claims against the Secretary, it stated only that the claims raised in this petition were "without merit." *Id.* at A18.

ARGUMENT

1. Petitioner first claims (Pet. 12-16) that the court of appeals erred in concluding that the district court had removal jurisdiction over this case. Its argument proceeds in two steps, first arguing that there was no federal-officer jurisdiction (which would justify removal under 28 U.S.C. 1442(a)(1)), and second arguing that there was no federal question jurisdiction (which would justify removal under Section 1441(b)). But whatever the merits of those arguments, they are irrelevant to the disposition of this case, because jurisdiction unquestionably was proper under the third statute on which the Secretary relied for removal, Section 1441(a).[3]

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[3] The government definitely relied on Section 1441(a) in the district court. See Pet. App. A30 (Secretary's amended removal petition, relying on Section 141(a)); Pet. App. A33-

Title 28 U.S.C. 1441(a) provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant * * * to the district court of the United States for the district and division embracing the place where such action is pending." 19 U.S.C. 2350 explicitly provides for subject-matter jurisdiction in the regional district courts over cases of this type (emphasis added):

> In providing technical and financial assistance under [the Trade Act of 1974] the Secretary may sue and be sued in any court of record of a State having general jurisdiction or in any United States district court, and *jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy.*

Accordingly, it is clear that the lower courts correctly concluded that removal was proper in this case. Petitioner's jurisdictional argument merits no further review.

2. Petitioner also contends (Pet. 16-20) that the district court erred in declining to allow petitioner to withdraw its demand for a jury trial, arguing that because the case sought a money recovery it should be treated as if it arose under the Tucker Act, 28 U.S.C. 1346 (where jury trials are barred by 28

A34 (opinion of district court discussing Section 1441(a)). To be sure, the government's brief in the court of appeals did not explicitly rely on Section 1441(a), but we believe a fair reading of the brief placed before the court of appeals all of the arguments made in the district court. See Gov't C.A. Br. 20 n.16 (noting that "[t]he Secretary relied on both § 1441 and § 1442 in its petitions for removal" and that "the lower court's ruling may be upheld on any other theory supported by the record").

U.S.C. 2402), even though the complaint stated that the case arose under the Trade Act rather than the Tucker Act. See Pet. App. A24. The main problem with this contention, though, is that it was not raised below,[4] and thus is not properly before this Court. See *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). Because petitioner does not address the arguments on the basis of which the district court (and, presumably, the court of appeals) concluded that the Secretary was entitled to a jury trial, the petition merits no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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DECEMBER 1991

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[4] The only arguments raised below were the arguments rejected by the district court, namely that government officers have no right to a jury trial and that the district court erred in relying on Fed. R. Civ. P. 38 to prevent petitioner from withdrawing its jury trial demand. See Pet. C.A. Br. 48-49; Reply Br. 23-24; Pet. for Reh'g 7. Petitioner cited neither 28 U.S.C. 2402 nor the Tucker Act in this section of its papers in the court of appeals.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR 84-855M
No. LR-M-1279

IN RE: LEIRD CHURCH FURNITURE MANUFACTURING COMPANY, INC., DEBTOR.

AP Nos. 84-540M and 84-558M
No. LR-C-88-55

LEIRD CHURCH FURNITURE MANUFACTURING COMPANY, INC. AND EDWARD L. KUTAIT, PLAINTIFFS

vs.

UNION NATIONAL BANK OF LITTLE ROCK, DEFENDANT

AP No. 86-170M
No. LR-C-85-605

UNION NATIONAL BANK OF LITTLE ROCK, PLAINTIFF

vs.

SECRETARY, U.S. DEPARTMENT OF COMMERCE, DEFENDANT

[Filed Apr. 7, 1989]

ORDER

Pending before the Court are the Recommendations of the Honorable James G. Mixon, United States Bankruptcy Judge for the Eastern District of Arkansas, to withdraw reference in AP Nos. 86-170M, 84-540M and 84-558M. A journey through the procedural maze of these cases is necessary for an understanding of the Court's ruling.

On March 23, 1984, Leird Church Furniture Manufacturing Company, Inc. ("Leird") and Edward Kutait ("Kutait") filed suit in Pulaski County Circuit Court against Union National Bank of Little Rock, Arkansas ("Union"). Their complaint arose out of several loan transactions, in particular several promissory notes totalling over $900,000.00 guaranteed by Kutait's brother and three promissory notes Leird executed which were guaranteed by the Economic Development Administration ("EDA") of the United States Department of Commerce. Leird contended that as a condition to making the loans guaranteed by the EDA, Union forced Kutait to relinquish control of Leird and placed its agent, Roger Morin, in the position of President and Chief Executive Officer of Leird.

The Leird Kutait complaint contains seven causes of action. Count I alleges that Union intentionally interferred with plaintiffs' contractual relationships and business expectancies by placing Morin in a position of control. Count II alleges that Union made material misrepresentations concerning Morin's ability to manage the business. Count III alleges that Union negligently entrusted to Morin the operation and control of Leird. Count IV alleges that Union subjected Leird to economic duress and made damaging threats. Count V alleges that Union was neg-

ligent in its selection of Morin and that it should have known of his capabilities and limitations. Count VI alleges that Union violated certain banking practices under 12 U.S.C. § 1971 *et seq.* Count VII alleges breach of fiduciary duty and fair dealing. Plaintiffs seek compensatory damages in the amount of five million dollars, and punitive damages in the amount of ten million dollars. Plaintiffs requested a jury trial.

Union answered and filed a counterclaim for the amount owed on the unpaid loans. In reply to the counterclaim, filed on June 1, 1984, plaintiffs alleged that the loans or debts were invalid, void and unenforceable.

On June 27, 1984, Leird filed a Chapter 11 petition in bankruptcy court.[1] The case was assigned docket no. LR-84-855M. Union filed its proof of claim on October 5, 1984. On November 28, 1984, Leird filed an objection to allowance of Union's claim. As a basis for the objection, Leird stated it was not indebted to Union for the reasons set forth in the state court proceeding filed in March. Leird requested that in the alternative, if the court allowed Union's claim, the claim be reduced by Leird's claim against Union or that it be subordinated under the principle of equitable subordination. Leird's objection was docketed as Adversary Proceeding (AP) 84-540 (hereinafter referred to as the "debt AP").

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[1] Upon motion, the bankruptcy court converted the case to a Chapter 7 proceeding by Order dated April 18, 1985. The bankruptcy court subsequently entered another Order on October 9, 1985, converting the case to a Chapter 7, relieving the trustee and the surety on the trustee's bond, and directing the debtor to file a newly completed Chapter 7 petition.

On December 6, 1984, Union removed the state proceeding of Leird and Kutait to bankruptcy court pursuant to Rule 9027 of the Rules of Bankruptcy Procedure. The removed action was docketed as Adversary Proceeding (AP) 84-558 (hereinafter referred to as the "tort AP"). On June 5, 1985, plaintiffs filed a jury demand.

On June 11, 1985, the bankruptcy court found that since 11 U.S.C. § 1478 which had governed removal had been repealed by the Bankruptcy Amendments and Federal Judgment Act of 1984, Bankruptcy Rule 9027 which had implemented 28 U.S.C. § 1478 was invalid. The bankruptcy court therefore transferred the tort AP to district court.

The transferred case was docketed in district court as LR-M-902. Union requested that the case be remanded to bankruptcy to which plaintiffs had not [*sic*] objection. By Order dated July 2, 1985, the Honorable Henry Woods, U.S. District Judge referred the case to bankruptcy pursuant to 28 U.S.C. § 157(b)(1), (2)(B) and (C).

On June 7, 1985, plaintiffs moved to amend their complaint to add the EDA as a necessary party pursuant to F.R.Civ.P. 19. That motion was subsequently withdrawn after Union filed an action against the Department of Commerce in state court. Union noted that it would request the district court action be transferred to bankruptcy to be consolidated with the tort AP.

Still at issue in the tort AP was plaintiffs' request for a jury trial. On March 19, 1986, the bankruptcy court entered a Memorandum Opinion and Order finding that tort AP was a core proceeding and that plaintiff was entitled to a jury trial on the tort claim. The court directed the trustee to intervene as party

plaintiff and demand a jury trial. The bankruptcy court referred the matter to the district court for a determination of whether the jury trial would be conducted in the district court or the bankruptcy court.

The tort AP was once again transferred to district court under LR-M-902. By Order dated August 13, 1986, Judge Woods referred the case to the bankruptcy court for jury trial pursuant to the provisions of Local Rule 32 III(e).

In the meantime, on July 23, 1985, Union filed a complaint in Pulaski County Circuit Court against the Secretary of the United States Department of Commerce ("Secretary"). Union alleged that the EDA (for which the Secretary is liable) had agreed to pay ninety percent of the total principal and interest due on two promissory notes executed by Leird, and had refused to honor these two separate loan guaranties. Union requested a jury trial. The Secretay removed the action to district court on August 23, 1985. The case was docketed as LR-C-85-605 and was assigned to this Court. Union filed a motion to remand. By Order filed November 5, 1985, the undersigned denied the motion for remand finding that removal was proper under 28 U.S.C. § 1442(a)(1).

Union then moved to refer LR-C-85-605 to bankruptcy court. Union noted that its claims were related to Leird's Chapter 7, particularly the debt AP. The Secretary opposed referral to bankruptcy. The Secretary argued that the cases were not related to the bankruptcy matters, and that even if the suit on the guaranties were related, the bankruptcy court could only make proposed findings of fact and conclusions of law as the Secretary would not consent to referral. After the issue was thoroughly argued by the parties, the undersigned by Order dated Febru-

ary 28, 1986, referred the case to the bankruptcy court. In particular, the Court found that the lawsuit was a "related" matter under 28 U.S.C. § 157.

The suit of Union against the Secretary was docketed in bankruptcy court as Adversary Proceeding (AP) 86-170 (hereinafter referred to as the "guaranty AP").

On September 24, 1987, Union moved to waive its demand for jury trial in the guaranty AP. Union requested that the guaranty AP be heard by the bankruptcy court prior to the jury trials in the debt AP and tort AP. In response to Union's motion, the Secretary demanded a jury trial and moved to combine the three APs for jury trial. The Secretary argued that the three APs arose out of the same facts and should be tried together before the same jury.

Faced with this procedural morass and with conflicting demands, the bankruptcy court held a hearing to try to resolve the issues. The parties were unable to agree to consent to a trial in bankruptcy court. Thus, on December 17, 1987, the bankruptcy court entered its recommendations for withdrawal of reference.

The bankruptcy court found that the proceeding between Leird, Kutait and Union (presumably the debt AP and tort AP) to be a core proceeding. The guaranty AP is a related proceeding. The bankruptcy court determined that separate trials of the core and related matters would be a waste of judicial economy. The bankruptcy court noted, however, that as it could only submit proposed findings of fact and conclusions of law in a related proceeding, it was not practical for the bankruptcy court to preside over a jury trial in the guaranty AP.

The recommendations [*sic*] for withdrawal of reference was docketed as LR-M-1279 and assigned to

this Court. The undersigned held a telephonic conference on January 4, 1988, at which time a preliminary matter arose of which district judge should consider the recommendations. Since the tort AP was assigned as a miscellaneous case to Judge Woods before the assignment of LR-C-85-605 (Union v. Secretary, subsequently the guaranty AP) to this Court, the Clerk initially determined the matter should be transferred to Judge Woods. However, after a telephonic conference between the undersigned, Judge Woods, and the Clerk of the Court, Judge Woods entered an Order assigning LR-M-902 (Union v. Leird, or the tort AP) civil case number LR-C-88-55, and transferring it to this Court.

Thus, the Court presently has before it a number of different files from several courts. Still at issue is whether reference should be withdrawn. The parties, in particular Union and the Secretary, have filed voluminous objections and responses to the bankruptcy court's recommendations. These objections and responses have been filed in LR-C-85-605.

Union objects to the bankruptcy court's recommendations on a number of grounds. It argues that (1) there is no right to a jury trial on the guaranty AP and the debt AP; (2) there is no right to a jury trial in a core proceeding, therefore the Court should reconsider whether the tort AP should be tried to a jury; and (3) the cases should not be consolidated as they involve different factual and legal issues and consolidations would be prejudicial to Union. Presumably, Union's bottom line is that the debt AP and guaranty AP should be consolidated and tried separately from the tort AP.

The Secretary argues that (1) it has a right to a jury trial on the guaranty AP; (2) the tort AP is not a core proceeding and therefore can be tried to a

jury; and (3) the cases should be consolidated because they involve similar factual and legal issues, and consolidation would be in the interest of judicial economy.

Leird and Kutait have voiced their positions in letters to the Court.[2] In a letter dated January 21, 1988 from Gregory M. Hopkins, Esq. to Judge Woods, Mr. Hopkins stated that the cases should be consolidated.

ANALYSIS

In addition to determining whether the debt, tort and guaranty APs should be consolidated, the Court must address a number of issues preliminarily.

1. Is the Tort AP a core proceeding?

The bankruptcy court found that the tort AP and the debt AP were core proceedings. Core proceedings include, but are not limited to those matters listed in 28 U.S.C. § 157(b)(2). In its Memorandum Opinion of March 19, 1986 in AP 84-558M, the bankruptcy court stated that the district court found the case to be a core proceeding under 28 U.S.C. § 157(b)(1), (b)(2)(B), and (b)(2)(C).[3] The bankruptcy court

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[2] The Court notes that the counsel have resorted to letter writing where formal motions or responses should be submitted and filed as part of the record. The Court directs that in the future the parties should make their positions known in the form of a motion or response, to be filed with the Clerk. *See* F.R.Civ.P. 7(b).

[3] Section 157 provides in relevant part:

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

determined that Leird's cause of action was a counterclaim for alleged interference with business relations.

It is in the first instance, the responsibility and the province of the bankruptcy court to determine whether a matter is a core or non-core proceeding. 28 U.S.C. § 157(b)(3) ("The bankruptcy judge shall determine, on the judge's own motion, or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11."); *In re Kaiser Steel Corp.*, 1989 WL 3479 (Bkrtcy. D. Colo. 1989).

"Where a creditor of the estate files a proof of claim and the estate counterclaims against him, or where the estate brings an action against a creditor and the creditor counterclaims asserting a setoff, it is entirely appropriate for the action to be classified as a core proceeding." *Matter of Honeycomb*, 72 B.R. 371, 373 (Bkrtcy. S.D.N.Y. 1987) (citation omitted).

Here, the tort AP arises out of the same transaction as that which gave rise to Union's proof of claim. Furthermore, the parties in the tort AP and the debt AP have consented to the bankruptcy forum in which to litigate their claims. Leird and Kutait filed a petition in bankruptcy; Union filed a proof of claim and

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[3] [Continued]

(2) Core proceeding include, but are not limited to—

* * * *

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under Chapter 11, 12, or 13 or title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

removed the original tort action to bankruptcy. *See In re Kroh Brothers Development Co.*, 91 B.R. 889 (Bkrtcy. W.D. Mo. 1988); *In re Beugen*, 81 B.R. 994 (Bkrtcy. N.D. Cal. 1988). In addition, neither of the parties to the tort AP objected to its characterization as a core proceeding, and therefore they have waived any objection and impliedly consented to the bankruptcy court's jurisdiction. *In re Rath Packing Co.*, 75 B.R. 137, 138 (N.D. Iowa 1987) ("Finally, Rath impliedly consented to the jurisdiction of the bankruptcy court by bring[ing] these claims seeking affirmative relief, by asserting that these claims were all core proceedings, and by failing to timely raise the issue of whether these claims are core proceedings.")

In sum, the Court agrees with the bankruptcy court that the tort AP and the debt AP are core proceedings.[4]

2. Whether the Secretary has a right to a jury trial on the guaranty AP?

As discussed above, Union originally requested a jury trial in its state court action against the Secretary. Union subsequently withdrew its request for a jury trial and now argues that the Secretary does not have a right to a jury trial.

The guaranty AP is a related proceeding; therefore, the unsettled issue of jury trials in core proceedings is not relevant to whether the guaranty AP can be tried to a jury.

The Court agrees with the Secretary that the Secretary has a right to a trial by jury because Union

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[4] The Court questions whether the Secretary has standing to challenge the determination of the tort AP as a core proceeding as the Secretary is not a party to that proceeding. However, as the Court is persuaded that the bankruptcy court's determination is correct, the Court need not resolve the issue of the Secretary's standing.

is suing on a contract, a suit at common law to which the right to a jury attaches. The Court further agrees with the Secretary that Union's demand for a jury trial may not be withdrawn without the consent of the Secretary.

Rule 38(d) of the Federal Rues of Civil Procedure provides that "[a] demand for a trial by jury . . . may not be withdrawn without the consent of the parties." The Rule ensures that one party may rely on another's jury demand. *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1304 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 279 and 104 S.Ct. 280 ("As a practical matter, Rule 38(d) prevents a party from withdrawing its request for a jury trial subsequent to the expiration of the period of a timely demand by the other parties hereby depriving those parties of the right to a trial by jury.") *See also Rosen v. Dick*, 639 F.2d 82 (2d Cir. 1980).

The Court therefore finds that the guaranty AP should be tried before a jury.

3. Should the core and related proceedings be consolidated? [5]

The issue of consolidation is not easily resolved given the 180° change in the position of the Secretary. The Court notes that with reference to Union's motion to remand in LR-C-85-605, the Secretary argued vigorously against removal of the guaranty

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[5] In his Recommendations, the bankruptcy judge stated that the three APs had been consolidated for trial. The records in the cases do not reflect that an order of consolidation was ever entered. The parties, in their objections to the Recommendations, also stress that the bankruptcy court never consolidated the cases. The uncertainty of whether the cases were consolidated in bankruptcy court, however, is of no import to this Court's determination on the question of consolidation.

action because of the different legal and factual issues in the guaranty action and the tort AP. The position is now completely reversed.

The Court is persuaded that a hearing on the issue of whether the cases should be consolidated is necessary. In particular, the parties should address what factual and legal issues are common to the cases; what prejudice any party will suffer as a result of consolidation; the risk of inconsistent adjudications and the possibility of collateral estoppel if the cases are not consolidated. The parties should refrain from raising issues which have already been resolved in this Order.

Accordingly, a hearing on the motion for consolidation is set for May 12, 1989 at 9:30 a.m.

The Court recognizes that a number of motions are pending, including several discovery motions and a motion for judgment on the pleadings. No action will be taken on these motions pending resolution of the issue of consolidation.

IT IS SO ORDERED this 6 day of April, 1989.

/s/ GEORGE HOWARD, JR.
United States District Judge

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